SUPREME COURT OF THE UNITED STATES.

No. 267.—October Term, 1926.

The United States of America, Appellant, *vs.* Freights, Sub-freights, Charter Hire, and or Sub-Charter Hire of the S.S. 'Mount Shasta.'	Appeal from the District Court of the United States for the District of Massachusetts.

[May 31, 1927.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a libel in admiralty against sub-freight alleged to be in the hands of the Palmer and Parker Company of Boston in the District of Massachusetts. It was dismissed by the District Court for lack of jurisdiction, 291 Fed. Rep. 92, and the decree having been entered on March 17, 1925, before the Act of February 13, 1925, c. 229, §§ 1, 14; 43 Stat. 936, 938, 942, went into effect, a direct appeal was taken to this Court under § 238 of the Judicial Code. The *Ira M. Hedges*, 218 U. S. 264, 270.

The United States, owner of the Steamship Mount Shasta, in May, 1920, made a bare boat charter of the vessel to the Mount Shasta Steamship Company through Victor S. Fox and Company, Inc., an agent of that Company, stipulating for a lien upon all cargoes and all sub freights for any amounts due under the charter party. Victor S. Fox and Company in July, 1920, made a sub-charter to Palmer and Parker Company for a voyage to bring a cargo of mahogany logs from the Gold Coast, Africa, to Boston. The vessel arrived in Boston with its cargo on February 19, 1921. There is due to the libellant $289,680 for the hire of the steamship, and the libel alleges that there is due and unpaid freight on the cargo of logs, $100,000, more or less, in the hands of Palmer and Parker Company, on which this libel seeks to establish a lien. It prays a monition against Palmer and Parker Company and all

persons interested, commanding payment of the freight money into Court, &c. Palmer and Parker Company was served. That Company filed exceptions to the libel, denied the jurisdiction of the Court and answered alleging ignorance of the original charter party and of the relations of the United States and the Mount Shasta S.S. Company to the vessel, and setting up counterclaims more than sufficient to exhaust the freight. The cargo had been delivered. The District Court assumed that a libel *in rem* could be maintained against freight money admitted to be due and payable, but was of opinion that the fund must exist when the suit is begun, or that the jurisdiction fails. The Court held that where, as here, the liability was denied in good faith, it did not appear that there was any res to be proceeded against and that the suit must be dismissed. The counsel for Palmer and Parker Company pressed the same considerations here in a somewhat more extreme form.

By the general logic of the law a debt may be treated as a res as easily as a ship. It is true that it is not tangible, but it is a right of the creditor's, capable of being attached and appropriated by the law to the creditor's duties. The ship is a res not because it is tangible but because it is a focus of rights that in like manner may be dealt with by the law. It is no more a res than a copy-right. How far in fact the admiralty has carried its proceeding *in rem* is a question of tradition. We are not disposed to disturb what we take to have been the understanding of the Circuit Courts for a good many years, and what the District Court assumed. *American Steel Barge Co.* v. *Chesapeake & Ohio Coal Agency Co.*, 115 Fed. Rep. 669; *Bank of British North America* v. *Freights of the Hutton*, 137 Fed. Rep. 534, 538; *Larsen* v. *150 Bales of Sisal Grass*, 147 Fed. Rep. 783, 785; *Freights of the Kate*, 63 Fed. Rep. 707.

But if it be conceded that the Admiralty Court has jurisdiction to enforce a lien on sub-freights by a proceeding *in rem*, and a libel is filed alleging such sub-freights to be outstanding, we do not perceive how the Court can be deprived of jurisdiction merely by an answer denying that such freights are due. The jurisdiction is determined by the allegations of the libel. *Louisville & Nashville R. R. Co.* v. *Rice*, 247 U. S. 201, 203. It may be defeated upon the trial by proof that the res does not exist. But the allegation of facts that if true make out a case entitles the party making them

to have the facts tried. It is said that the Court derives its jurisdiction from its power, and no doubt its jurisdiction ultimately depends on that. But the jurisdiction begins before actual seizure, and authorizes a warrant to arrest, which may or may not be successful. Here the debtor is within the power of the Court and therefore the debt, if there is one, is also within it. The Court has the same jurisdiction to try the existence of the debt that it has to try the claim of the libellant for the hire of the Mount Shasta. If the proof that there is freight due shall fail it does not matter very much whether it be called proof that the Court had no jurisdiction or proof that the plaintiff had no case. Either way the libel will be dismissed. See *Ira M. Hedges*, 218 U. S. 264, 270. *Lamar* v. *United States*, 240 U. S. 60, 64.

Decree reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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The separate opinion of Mr. Justice McReynolds.

I am unable to accept the view that an admiralty court may entertain an action *in rem* when there is nothing which the marshal can take into custody. The technical term *in rem* is used to designate a proceeding against some thing. This court and text writers again and again have pointed out the essential nature of such thing. The jurisdiction is founded upon physical power over a *res* within the district upon the theory that it is "a contracting or offending entity," a "debtor" or "offending thing", something that can be arrested or taken into custody, or which can be fairly designated as tangible property. *The Sabine*, 11 Otto 384, 388; *The Robert W. Parsons*, 191 U. S. 17, 37; Benedict on Admiralty, 5th ed., Secs. 11, 297; Hughes on Admiralty, 2d ed., 400, 401; Admiralty Rules 10, 22.

Here the thing supposed to be within the district and proceeded against was an unliquidated, uncertain and disputed claim for freight, which manifestly could not be arrested or taken into custody. To base jurisdiction for an action *in rem* upon this intangible claim would amount to a denial of the essential nature of the proceeding.

Of course, jurisdiction of an admiralty court—that is, power to hear and adjudge the issues, not merely to send out a monition—is not finally to be determined by mere allegations of the libel any

more than jurisdiction of a court of law ultimately depends upon the plaintiff's allegation that the defendant is alive and within the district. If it appear that the defendant has never been there or was dead when the action began, certainly the court can go no further.

An examination of *Freights of the Kate*, 63 Fed. 707; *American Steel Barge Co.* v. *Chesapeake & Ohio Coal Agency Co.*, 115 Fed. 669; *Bank of British North America* v. *Freights of the Hutton*, 137 Fed. 534, 538; and *Larsen* v. *150 Bales of Sisal Grass*, 147 Fed. 783, 785, I think, will fail to disclose any adequate support for the theory repudiated by the court below. Some language of *American Steel Barge Co.* v. *Chesapeake & Ohio Coal Agency Co.*, taken alone, seems to favor that view; but, in fact, the libel there was against "the cargo of coal" "and the freight on said cargo of coal." The prayer asked for process against "said cargo of coal and against said sub-freight thereon," and "that said cargo may be ordered by the court to be sold and the proceeds thereof applied to said payment."

The decree below should be affirmed.